

AMENDED IN ASSEMBLY JUNE 19, 2014

AMENDED IN SENATE MAY 27, 2014

AMENDED IN SENATE MAY 7, 2014

AMENDED IN SENATE MARCH 17, 2014

**SENATE BILL**

**No. 980**

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**Introduced by Senator Lieu  
(Coauthor: Senator Leno)**

February 11, 2014

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An act to amend Sections 1405 and 1417.9 of, and to add Section 1405.1 to, the Penal Code, relating to DNA testing.

LEGISLATIVE COUNSEL'S DIGEST

SB 980, as amended, Lieu. Prisoners: DNA testing.

(1) Existing law allows an incarcerated person who has been convicted of a felony to make a written motion for the performance of forensic deoxyribonucleic acid (DNA) testing according to a specified procedure.

This bill would, upon appointment or retention of counsel to investigate and file a motion pursuant to these provisions, or at any time after a petition for DNA testing has been filed, authorize a court to order that counsel be provided information and documentation as to the existence and availability of evidence that may be subject to DNA testing, relating to the investigation, arrest, ~~and~~ or prosecution of the defendant upon a showing that there is good cause to believe that the information and documentation is reasonably necessary to the counsel's effort to investigate whether a motion for DNA testing is appropriate, as specified.

(2) Existing law requires a court to grant the motion for DNA testing if it determines, among other things, that the requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction.

This bill would state that the defendant is not required to show that a favorable test result would conclusively establish his or her innocence before the court may grant a motion for DNA testing. *The bill would prohibit a court from deciding whether the requested DNA testing results, assuming a DNA test result favorable to the defendant, would ultimately require some form of relief from the conviction.* The bill would authorize a court to order the relevant governmental entity to conduct a keyboard search of the *state index system or the Combined DNA Index System (CODIS)* to compare a profile obtained from the results of DNA testing conducted pursuant to these provisions to the profiles contained in the *state index system or the CODIS* databank. The bill would change the accreditation requirements for a laboratory that may be designated by the court to perform the DNA testing pursuant to these provisions if the parties cannot mutually agree on a laboratory, as specified.

(3) Existing law requires the appropriate governmental entity to retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with the case. Existing law allows the governmental entity to dispose of biological material before the expiration of this time period if the governmental entity notifies the inmate and his or her counsel, and the notifying entity does not receive, within 90 days of sending the notification, a motion for DNA testing, a request that the material not be destroyed because a motion for DNA testing will be filed within 180 days, or a declaration of innocence that has been filed with the court within 180 days of the judgment of conviction.

This bill would require the governmental entity to retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated or on parole in connection with the case. The bill would allow the governmental entity to dispose of biological material before the expiration of this time if the governmental entity notifies the inmate and his or her counsel, and the notifying entity does not receive, within one year of sending the notification, a motion for DNA testing, a request that the material not

be destroyed because a motion for DNA testing will be filed within one year, or a declaration of innocence that has been filed with the court within one year of the judgment of conviction. By increasing the duties of local governmental entities in regard to the retention of biological material, this bill would impose a state-mandated local program.

If evidence has been destroyed in violation of these provisions, and if the appropriate governmental entity receives a request for evidence, the bill would require the agency to submit a statement that a representative from the agency personally searched for the requested evidence and determined that the evidence has been destroyed. This bill would require the statement to be signed under penalty of perjury. By expanding the crime of perjury, this bill would impose a state-mandated local program. The bill would require the court to consider appropriate remedies if it finds that biological evidence has been destroyed.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 1405 of the Penal Code is amended to  
2 read:  
3 1405. (a) A person who was convicted of a felony and is  
4 currently serving a term of imprisonment may make a written  
5 motion before the trial court that entered the judgment of conviction  
6 in his or her case, for performance of forensic deoxyribonucleic  
7 acid (DNA) testing.  
8 (b) (1) An indigent convicted person may request appointment  
9 of counsel to prepare a motion under this section by sending a  
10 written request to the court. The request shall include the person's  
11 statement that he or she was not the perpetrator of the crime and

1 that DNA testing is relevant to his or her assertion of innocence.  
2 The request also shall include the person's statement as to whether  
3 he or she previously has had counsel appointed under this section.

4 (2) If any of the information required in paragraph (1) is missing  
5 from the request, the court shall return the request to the convicted  
6 person and advise him or her that the matter cannot be considered  
7 without the missing information.

8 (3) (A) Upon a finding that the person is indigent, he or she  
9 has included the information required in paragraph (1), and counsel  
10 has not previously been appointed pursuant to this subdivision,  
11 the court shall appoint counsel to investigate and, if appropriate,  
12 to file a motion for DNA testing under this section and to represent  
13 the person solely for the purpose of obtaining DNA testing under  
14 this section.

15 (B) Upon a finding that the person is indigent, and counsel  
16 previously has been appointed pursuant to this subdivision, the  
17 court may, in its discretion, appoint counsel to investigate and, if  
18 appropriate, to file a motion for DNA testing under this section  
19 and to represent the person solely for the purpose of obtaining  
20 DNA testing under this section.

21 (4) This section does not provide for a right to the appointment  
22 of counsel in a postconviction collateral proceeding, or to set a  
23 precedent for any such right, in any context other than the  
24 representation being provided an indigent convicted person for the  
25 limited purpose of filing and litigating a motion for DNA testing  
26 pursuant to this section.

27 (c) Upon appointment of counsel pursuant to subdivision (b),  
28 or upon retention of counsel in all other cases, to investigate and,  
29 if appropriate, to file a motion for DNA testing pursuant to this  
30 section, and upon request of counsel, or at any time after a petition  
31 has been filed pursuant to this section, a court may order that  
32 counsel, or counsel's representatives, be provided information and  
33 documentation as to the existence and availability of evidence that  
34 may be subject to DNA testing, including, but not limited to, any  
35 physical evidence relating to the investigation, arrest, ~~and~~ or  
36 prosecution of the defendant, upon a showing that there is good  
37 cause to believe that the information and documentation is  
38 reasonably necessary to the counsel's effort to investigate whether  
39 a motion for DNA testing is appropriate. Upon request of counsel,  
40 and upon a showing that there is good cause to believe that it is

1 reasonably necessary to counsel's effort to investigate whether a  
2 motion for DNA testing is appropriate, the court also may order  
3 all of the following:

4 (1) The appropriate governmental entity to locate and provide  
5 counsel with any documents, notes, logs, or reports relating to  
6 items of physical evidence collected in connection with the case  
7 or to otherwise assist the defendant in locating items of biological  
8 evidence that the governmental entity contends have been lost or  
9 destroyed.

10 (2) The appropriate governmental entity to take reasonable  
11 measures to locate biological evidence that may be in its custody.

12 (3) The appropriate governmental entity to assist counsel in  
13 locating relevant evidence that is accessible to the governmental  
14 entity that may be in the custody of a public or private hospital,  
15 public or private laboratory, or other facility.

16 (4) The production of laboratory documents of analyses  
17 performed from the time of evidence intake to disposition, in the  
18 original form provided by the laboratory, as prepared in connection  
19 with the examination or analyses of any items collected as evidence  
20 that may contain biological material. This includes, but is not  
21 limited to, the underlying data and laboratory notes prepared in  
22 connection with DNA tests, presumptive tests for the presence of  
23 biological material, serological tests, and analyses of trace  
24 evidence, if the evidence had been subjected to that testing. Any  
25 and all items from the requested case file shall be made available,  
26 including digital files and nonphotocopied photograph-quality  
27 prints of photographs taken.

28 (d) (1) The motion for DNA testing shall be verified by the  
29 convicted person under penalty of perjury and shall do all of the  
30 following:

31 (A) Explain why the identity of the perpetrator was, or should  
32 have been, a significant issue in the case.

33 (B) Explain, in light of all the evidence, how the requested DNA  
34 testing would raise a reasonable probability that the convicted  
35 person's verdict or sentence would be more favorable if the results  
36 of DNA testing had been available at the time of conviction.

37 (C) Make every reasonable attempt to identify both the evidence  
38 that should be tested and the specific type of DNA testing sought.

1 (D) Reveal the results of any DNA or other biological testing  
2 that was conducted previously by either the prosecution or defense,  
3 if known.

4 (E) State whether any motion for testing under this section  
5 previously has been filed and the results of that motion, if known.

6 (2) Notice of the motion shall be served on the Attorney General,  
7 the district attorney in the county of conviction, and, if known, the  
8 governmental agency or laboratory holding the evidence sought  
9 to be tested. Responses, if any, shall be filed within 60 days of the  
10 date on which the Attorney General and the district attorney are  
11 served with the motion, unless a continuance is granted for good  
12 cause.

13 (e) If the court finds evidence was subjected to DNA or other  
14 forensic testing previously by either the prosecution or defense, it  
15 shall order the party at whose request the testing was conducted  
16 to provide all parties and the court with access to the laboratory  
17 reports, underlying data, and laboratory notes prepared in  
18 connection with the DNA or other biological evidence testing.

19 (f) The court, in its discretion, may order a hearing on the  
20 motion. The motion shall be heard by the judge who conducted  
21 the trial, or accepted the convicted person's plea of guilty or nolo  
22 contendere, unless the presiding judge determines that judge is  
23 unavailable. Upon request of either party, the court may order, in  
24 the interest of justice, that the convicted person be present at the  
25 hearing of the motion.

26 (g) Before the granting of a motion for DNA testing pursuant  
27 to this section, the defendant is not required to show that a  
28 favorable test would conclusively establish his or her innocence.  
29 Rather, the court shall grant the motion for DNA testing if it  
30 determines all of the following have been established:

31 (1) The evidence to be tested is available and in a condition that  
32 would permit the DNA testing requested in the motion.

33 (2) The evidence to be tested has been subject to a chain of  
34 custody sufficient to establish it has not been substituted, tampered  
35 with, replaced, or altered in any material aspect, *or* if the chain of  
36 custody does not establish the integrity of the evidence, the testing  
37 itself has the potential to establish the integrity of the evidence.  
38 For purposes of this section, evidence that has been in the custody  
39 of law enforcement, other government officials, or a public or  
40 private hospital shall be presumed to satisfy the chain of custody

1 requirement of this paragraph, absent specific evidence of material  
2 tampering, replacement, or alteration.

3 (3) The identity of the perpetrator of the crime was, or should  
4 have been, a significant issue in the case.

5 (4) The convicted person has made a prima facie showing that  
6 the evidence sought to be tested is material to the issue of the  
7 convicted person's identity as the perpetrator of, or accomplice  
8 to, the crime, special circumstance, or enhancement allegation that  
9 resulted in the conviction or sentence.

10 (5) The requested DNA testing results would raise a reasonable  
11 probability that, in light of all the evidence, the convicted person's  
12 verdict or sentence would have been more favorable if the results  
13 of DNA testing had been available at the time of conviction. *In*  
14 *determining whether to grant testing, the court shall not decide*  
15 *whether the requested DNA testing results, assuming a DNA test*  
16 *result favorable to the defendant, would ultimately require some*  
17 *form of relief from the conviction.* The court in its discretion may  
18 consider any evidence whether or not it was introduced at trial.

19 (6) The evidence sought to be tested meets either of the  
20 following conditions:

21 (A) The evidence was not tested previously.

22 (B) The evidence was tested previously, but the requested DNA  
23 test would provide results that are reasonably more discriminating  
24 and probative of the identity of the perpetrator or accomplice or  
25 have a reasonable probability of contradicting prior test results.

26 (7) The testing requested employs a method generally accepted  
27 within the relevant scientific community.

28 (8) The motion is not made solely for the purpose of delay.

29 (h) (1) If the court grants the motion for DNA testing, the court  
30 order shall identify the specific evidence to be tested and the DNA  
31 technology to be used.

32 (2) The testing shall be conducted by a laboratory mutually  
33 agreed upon by the district attorney in a noncapital case, or the  
34 Attorney General in a capital case, and the person filing the motion.  
35 If the parties cannot agree, the court shall designate the laboratory  
36 to conduct the testing and shall consider designating a laboratory  
37 accredited by an accreditation body that is a signatory to the  
38 International Laboratory Accreditation Cooperation (ILAC) Mutual  
39 Recognition Agreement (MRA) and offers forensic laboratory  
40 accreditation services.

(3) Analysts, technicians, or other agents of the laboratory conducting the testing, including local or state governmental laboratories, shall communicate directly with and provide documentation directly to both parties, and shall not communicate with, or take direction from, one party individually, unless the parties agree otherwise.

(i) The result of any testing ordered under this section shall be fully disclosed to the person filing the motion, the district attorney, and the Attorney General. If requested by any party, the court shall order production of the underlying laboratory data and notes.

(j) (1) The cost of DNA testing ordered under this section shall be borne by the state or the applicant, as the court may order in the interests of justice, if it is shown that the applicant is not indigent and possesses the ability to pay. However, the cost of any additional testing to be conducted by the district attorney or Attorney General shall not be borne by the convicted person.

(2) In order to pay the state's share of any testing costs, the laboratory designated in subdivision (g) shall present its bill for services to the superior court for approval and payment. It is the intent of the Legislature to appropriate funds for this purpose in the 2000–01 Budget Act.

(k) An order granting or denying a motion for DNA testing under this section shall not be appealable, and shall be subject to review only through petition for writ of mandate or prohibition filed by the person seeking DNA testing, the district attorney, or the Attorney General. The petition shall be filed within 20 days after the court's order granting or denying the motion for DNA testing. In a noncapital case, the petition for writ of mandate or prohibition shall be filed in the court of appeal. In a capital case, the petition shall be filed in the California Supreme Court. The court of appeal or California Supreme Court shall expedite its review of a petition for writ of mandate or prohibition filed under this subdivision.

(l) DNA testing ordered by the court pursuant to this section shall be done as soon as practicable. However, if the court finds that a miscarriage of justice will otherwise occur and that it is necessary in the interests of justice to give priority to the DNA testing, a DNA laboratory shall be required to give priority to the DNA testing ordered pursuant to this section over the laboratory's other pending casework.

1 (m) DNA profile information from biological samples taken  
2 from a convicted person pursuant to a motion for postconviction  
3 DNA testing is exempt from any law requiring disclosure of  
4 information to the public.

5 (n) Notwithstanding any other provision of law, the right to file  
6 a motion for postconviction DNA testing provided by this section  
7 is absolute and shall not be waived. This prohibition applies to,  
8 but is not limited to, a waiver that is given as part of an agreement  
9 resulting in a plea of guilty or nolo contendere.

10 (o) The provisions of this section are severable. If any provision  
11 of this section or its application is held invalid, that invalidity shall  
12 not affect other provisions or applications that can be given effect  
13 without the invalid provision or application.

14 SEC. 2. Section 1405.1 is added to the Penal Code, to read:

15 1405.1. (a) If the court grants a motion for DNA testing  
16 pursuant to Section 1405, testing is performed, and a DNA profile  
17 is obtained from the results of DNA testing of biological material  
18 that excludes the convicted person, the court may, on its own  
19 motion or by motion of the defendant, order the relevant  
20 governmental agency to conduct a keyboard search of the  
21 Combined DNA Index System (CODIS) to compare the profile  
22 obtained from the results of DNA testing of biological material to  
23 the profiles contained within the *state index system or the* CODIS  
24 databank. DNA profiles shall meet current national DNA database  
25 index system eligibility standards and conform to current Federal  
26 Bureau of Investigation quality assurance standards in order to be  
27 eligible for search against the state index system *or the CODIS*  
28 *databank. A court shall not order a keyboard search of the state*  
29 *index system or the CODIS databank to make a comparison that*  
30 *would violate state index system or CODIS rules.*

31 (b) For the purposes of this section, profiles contained within  
32 the CODIS databank includes those profiles contained with the  
33 Convicted Offender Index, the Forensic Index, the Arrestee Index,  
34 the Missing or Unidentified Persons Index, and the Missing Persons  
35 Reference Index.

36 SEC. 3. Section 1417.9 of the Penal Code is amended to read:

37 1417.9. (a) Notwithstanding any other provision of law and  
38 subject to subdivision (b), the appropriate governmental entity  
39 shall retain all biological material that is secured in connection  
40 with a criminal case for the period of time that any person remains

1 incarcerated or on parole in connection with that case. The  
2 governmental entity shall have the discretion to determine how  
3 the evidence is retained pursuant to this section, provided that the  
4 evidence is retained in a condition suitable for deoxyribonucleic  
5 acid (DNA) testing.

6 (b) A governmental entity may dispose of biological material  
7 before the expiration of the period of time described in subdivision  
8 (a) if all of the conditions set forth below are met:

9 (1) The governmental entity notifies all of the following persons  
10 of the provisions of this section and of the intention of the  
11 governmental entity to dispose of the material: any person, who  
12 as a result of a felony conviction in the case is currently serving a  
13 term of imprisonment and who remains incarcerated or on parole  
14 in connection with the case, any counsel of record, the public  
15 defender in the county of conviction, the district attorney in the  
16 county of conviction, and the Attorney General.

17 (2) The notifying entity does not receive, within one year of  
18 sending the notification, any of the following:

19 (A) A motion filed pursuant to Section 1405. However, upon  
20 filing of that motion, the governmental entity shall retain the  
21 material only until the time that the court's denial of the motion  
22 is final.

23 (B) A request under penalty of perjury that the material not be  
24 destroyed or disposed of because the declarant will file a motion  
25 for DNA testing pursuant to Section 1405 within one year, unless  
26 a request for an extension is requested by the convicted person  
27 and agreed to by the governmental entity in possession of the  
28 evidence.

29 (C) A declaration of innocence under penalty of perjury that  
30 has been filed with the court within one year of the judgment of  
31 conviction or July 1, 2001, whichever is later. However, the court  
32 shall permit the destruction of the evidence upon a showing that  
33 the declaration is false or there is no issue of identity that would  
34 be affected by additional testing. The convicted person may be  
35 cross-examined on the declaration at any hearing conducted under  
36 this section or on an application by or on behalf of the convicted  
37 person filed pursuant to Section 1405.

38 (3) No other provision of law requires that biological evidence  
39 be preserved or retained.

1 (c) Notwithstanding any other provision of law, the right to  
2 receive notice pursuant to this section is absolute and shall not be  
3 waived. This prohibition applies to, but is not limited to, a waiver  
4 that is given as part of an agreement resulting in a plea of guilty  
5 or nolo contendere.

6 (d) If evidence has been destroyed in violation of this section  
7 or otherwise, and if the appropriate governmental entity receives  
8 a request for evidence under Section 1405, the appropriate  
9 governmental entity shall submit a statement that a representative  
10 from the agency personally searched for the requested evidence,  
11 without relying solely upon the agency's internal index or evidence  
12 location database, and determined that the evidence has been  
13 destroyed. The statement shall be signed under penalty of perjury  
14 by the agency's representative who conducted the search. If the  
15 court finds that biological evidence was destroyed in violation of  
16 the provisions of this section, it shall consider appropriate remedies.

17 SEC. 4. No reimbursement is required by this act pursuant to  
18 Section 6 of Article XIII B of the California Constitution for certain  
19 costs that may be incurred by a local agency or school district  
20 because, in that regard, this act creates a new crime or infraction,  
21 eliminates a crime or infraction, or changes the penalty for a crime  
22 or infraction, within the meaning of Section 17556 of the  
23 Government Code, or changes the definition of a crime within the  
24 meaning of Section 6 of Article XIII B of the California  
25 Constitution.

26 However, if the Commission on State Mandates determines that  
27 this act contains other costs mandated by the state, reimbursement  
28 to local agencies and school districts for those costs shall be made  
29 pursuant to Part 7 (commencing with Section 17500) of Division  
30 4 of Title 2 of the Government Code.